

Issue: Compliance/management resolution step-respondent, failing to provide documentation related to the grievance; Ruling Date: March 2, 2004; Ruling #2003-441; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: agency out of compliance with respect to the grievant's third resolution step; agency in compliance with respect to the documentation request.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation, and Substance Abuse
Services/ No. 2003-441
March 2, 2004

The grievant has requested a ruling in his September 18, 2003 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) on whether the agency is out of compliance with the grievant procedure. The grievant contends that the agency has violated substantial procedural requirements of the grievance procedure by (1) forcing him to meet with a management resolution step-respondent who the grievant alleges had condoned acts of retaliation against him and (2) failing to provide documentation related to the grievance.

FACTS

The grievant is Assistant Director of Security on the evening shift with DMHMRSAS. On February 25, 2003, the grievant was asked to organize a folder containing fire drill and evacuation records for the facility. In reviewing the folder, the grievant became suspicious that the records had been altered to appear as though fire drills/evacuations had been conducted throughout the year when they had not. The grievant reported his concerns to the acting Risk Manager on July 14, 2003. Following an agency investigation, the grievant's suspicions were verified, followed by the Director of Security's retirement.

On August 19, 2003, DMHMRSAS issued the grievant a Group II Written Notice for failure to report a safety violation in a timely manner. The Written Notice states that "[a]s a result of this excessive delay, adulterated documents were submitted to a regulatory agency and a full investigation by appropriate individuals to determine if there was a serious safety violation was significantly delayed."¹ The grievant challenged the Written Notice in a September 18, 2003 grievance. The grievant claims that the Written Notice is unwarranted, an act of retaliation for reporting safety violations, and resulted in an unfair "downgrade" of his position. Specifically, the grievant claims that in the past,

¹ The falsified records were submitted to Medicaid inspectors on February 26, 2003. See Group II Written Notice and Attachment, dated August 19, 2003.

he, as Assistant Director of Security, acted as acting Director in the Director's absence.² However, on July 28, 2003, following the Director of Security's retirement, the agency appointed a night shift employee as the Acting Director.³

In connection with his grievance, the grievant requested a number of documents, including:

1. Fire drills – last five years NOC [night] shift
2. Fire panels weekly log – last 3 years
3. Emergency exit lights log, last 3 years
4. Fire Extinguisher sign off – monthly July, August, September, and October 2003
5. Water temperature weekly readings log – last three years
6. Daily Security worksheets from 7/28/03 – present
7. New Security Audit Sheet for August, September, October 2003

The agency refused to produce these documents to the grievant, claiming that they are not relevant to the incident that gave rise to the disciplinary action and that it would be overly burdensome on the agency to produce them. The grievant claims that these documents are relevant because they demonstrate that the individual who is currently acting as Director of Security is not fulfilling the duties of the position, and that the grievant should be returned to the position of acting Director.

DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁵ If the grievant believes that an agency is out of compliance, he must notify the agency head of the alleged noncompliance. If after five workdays the grievant believes that the agency has failed to correct the alleged noncompliance, the grievant may request a ruling from this Department.

² The agency stated during this Department's investigation that the grievant received no title or additional pay when he was acting Director.

³ See email from acting Risk Manager to Security Department, dated July 28, 2003, stating that "in light of [grievant's] pending retirement, I have asked [night shift employee] to be temporarily in charge of Security until further notice." During this Department's investigation, the agency stated that this individual works at the same level as the grievant. He, like the grievant before him, receives no additional pay for his role as the acting Director of the Security.

⁴ See *Grievance Procedure Manual* § 6, pages 16-18.

⁵ *Grievance Procedure Manual* § 6.3, page 17.

Step Respondents

The grievant claims that the agency has violated a substantial procedural requirement of the grievance procedure by requiring him to meet at the third step with the Facility Director, who he alleges condoned acts of retaliation taken against him.

Under the grievance procedure, “a grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor.”⁶ Moreover, if a grievant alleges discrimination or retaliation by an individual who would otherwise serve as the agency’s designated second-step respondent, the employee may: (1) request that the agency designate another second-step respondent, or (2) waive the face-to-face meeting with the original second-step respondent and receive only a written second step response to the grievance.⁷ If the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent.⁸ There is no corresponding provision in the grievance procedure for an employee alleging discrimination or retaliation by his third-step respondent; however, the grievant claims that the same principles that apply to cases of retaliation/discrimination by the first- and second-step respondents should also apply to the third-step respondent.

DMHMRSAS reported during this Department’s investigation that ordinarily step respondents to grievances in the grievant’s facility are as follows: (1) the first-step respondent is always the immediate supervisor, (2) the second-step respondent is the senior staff member in that department (in this case, the Risk Manager), and (3) the third-step respondent is the Facility Director. In this case, because the grievant’s immediate supervisor is also the acting Risk Manager, the grievant’s first and second steps collapsed into a single second-step. Alleging that the acting Risk Manager retaliated against him, the grievant elected to waive the face-to-face meeting at the second-step. Accordingly, under the grievance procedure, the grievant is entitled to a face-to-face meeting at the third-step.⁹

However, the grievant claims that the usual third-step respondent, the Facility Director, has condoned acts of retaliation against him by the acting Risk Manager. Specifically, the grievant claims that the Facility Director was aware of the grievant’s allegations of fraud by the former Director of Security and consulted with the acting Risk Manager about the grievant’s disciplinary action and removal of duties. The grievant states that because the Facility Director allegedly allowed the retaliation to occur, the grievant should be allowed to meet with the next level of management, the Assistant Commissioner. Indeed, according to this Department’s records, in 1997, DMHMRSAS

⁶ *Grievance Procedure Manual* § 2.4(1), page 7.

⁷ *Grievance Procedure Manual* § 3.2, page 9.

⁸ *Id.*

⁹ *Id.*

requested the designation of the next level supervisor (the Associate Commissioner) as the step respondent in grievances involving an allegation of retaliation by the Facility Director.¹⁰

Thus, the agency is directed to allow the grievant to discuss his complaint at the third management resolution step with the Associate Commissioner.

Documents

The grievance statute provides that “[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party.”¹¹ This Department’s interpretation of the mandatory language “shall be made available” is that absent just cause, all relevant grievance-related information *must* be provided. This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing.

DMHMRSAS claims that the documents requested by the grievant are irrelevant to the issues in the grievances. Specifically, the agency claims that Request #1 (for fire drill records for the last 5 years on the night shift) is irrelevant because the grievant works on the evening shift, and his reporting of falsified fire drill records concerned the evening shift, not the night shift. The agency further states that Requests #2-5 (requesting logs for fire panels, exit lights, fire extinguishers, and water temperature) are irrelevant because they have nothing to do with the grievant’s Written Notice or with the grievant’s allegations of fraud, which concerned only fire drills/evacuations on the evening shift. Finally, the agency claims that Requests #4, #6, and #7 (requesting records from July 2003-present) are not related to the grievance because these records were created *after* the grievant (1) learned of the falsified documents (February 2003), (2) first reported the falsification of safety records (July 14, 2003), (3) was removed as acting Director of Security (July 28, 2003). The agency further claims that production of these documents would be overly burdensome. The grievant claims that these documents are relevant to his grievance because they demonstrate that the current acting Director of Security is not doing his job and that the grievant should be returned to the “acting Director” capacity.

¹⁰ See Letter from DMHMRSAS Employee Relations Manager to EDR (formerly Department of Employee Relations Counselors) Director, dated February 11, 1997. See also Response from EDR Director to DMHMRSAS, dated February 26, 1997.

¹¹ Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21. As defined by the Rules of the Supreme Court of Virginia, documents include “writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detections devises into reasonable usable form.” Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).

The grievant raises as an issue in his grievance the agency's "decision in regards to the placing of current acting Director of Security."¹² He further states as a fact in support of his grievance the "wrongful and condoned placing of now acting Director of Security and his non-compliance of job duties."¹³ Therefore, it appears that the grievance has raised the acting Director of Security's alleged incompetence as an issue in his grievance.

The grievance procedure states that an employee's grievance must "[p]ertain directly and personally to the employees' own employment."¹⁴ Here, however, the grievant's co-worker's ability (or inability) to perform the responsibilities of his position does not directly and personally affect the grievant. The issues pertaining directly and personally to the grievant's own employment are whether (1) the Group II Written Notice he received was warranted under the circumstances, (2) the removal of the grievant's duties, specifically the removal of his "acting Director" capacity, was appropriate, and (3) the agency retaliated against the grievant. Even if the requested documentation demonstrates what the grievant claims -- that the current acting Director is not adequately performing the duties of his position -- such a demonstration does not tend to establish that the Written Notice and removal of duties were unwarranted or retaliatory. Therefore, the requested documents are not relevant to this grievance and DMHMRSAS is not required to provide these documents to the grievant.

CONCLUSION

For the reasons discussed above, this Department has determined that the agency is in compliance with the grievance procedure with respect to the document request and out of compliance with respect to the grievant's third resolution step. By copy of this ruling, the grievant and the agency are advised that the grievant has five workdays from receipt of this ruling to advance or conclude his grievance. This Department's rulings on matters of compliance are final and nonappealable.¹⁵ Further, this ruling responds to the grievant's compliance concerns and in no way reflects the substantive merits of the grievant's claim.

Claudia T. Farr
Director

Leigh A. Brabrand

¹² Grievance Form A, Attachment 1, dated September 18, 2003.

¹³ Grievance Form A, Attachment 2, dated September 18, 2003.

¹⁴ *Grievance Procedure Manual* § 2.4, page 6.

¹⁵ Va. Code § 2.2-1001(5).

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